Nos. 95-124 and 95-227

In the Supreme Court of the United States

OCTOBER TERM, 1995

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ALLIANCE FOR COMMUNITY MEDIA, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR THE FEDERAL RESPONDENTS

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

10 pp

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-124

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 95-227

ALLIANCE FOR COMMUNITY MEDIA, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR THE FEDERAL RESPONDENTS

This brief is submitted pursuant to Supreme Court Rule 25.5 to notify the Court of newly enacted legislation. On February 8, 1996, the President signed into law the Telecommunications Act of 1996, Pub. L. No. 104-104 (the 1996 Act). The three provisions

of that statute noted herein are reprinted in the Appendix to this brief.

1. Section 504 of the 1996 Act provides that, "[u]pon request by a cable service subscriber, a cable operator shall, without charge, fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it." App., *infra*, 1a. That provision generally enables subscribers to ensure that they will receive only those cable channels to which they subscribe and that they will not receive either the audio or video portions of any channel to which they do not subscribe. It applies to all cable channels, regardless of the content of the channel or any of the programming on that channel. In our view, it has no bearing on the legal issues in this case.

2. Section 505 of the 1996 Act provides that a "multichannel video programming distributor"—a phrase that includes cable operators, see 47 U.S.C. 522(12) (Supp. V 1993)—must scramble or block "sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming." App., *infra*, 2a. That requirement extends to both audio and video portions of such programming. Until the distributor can commence such scrambling or blocking, Section 505 requires the distributor not to provide such programming "during the hours of the day (as determined by the [Federal Communications] Commission) when a significant number of children are likely to view it." *Ibid.*

Section 505 neither modifies nor amends any of the provisions of Section 10 of the 1992 Cable Act that petitioners challenge in this case. Section 505,

however, has effects similar to Section 10(b) of the 1992 Cable Act in one respect. Section 10(b) provides that cable operators who permit the showing of indecent programming on commercial access channels must segregate such programming on separate channels and block it unless and until the subscriber requests access to it. Section 505's blocking scheme extends a similar requirement to channels "primarily dedicated to sexually-oriented programming." It therefore may have relevance to petitioners' underinclusiveness argument. See Alliance Br. 41-43; DAETC Br. 47-48.

3. Section 506 of the 1996 Act includes two provisions that amend sections of the Communications Act providing that cable operators shall exercise no editorial control over, respectively, PEG and leased access channels.

a. Section 506(a) applies to PEG channels. Since 1984, the Communications Act has provided that "a cable operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity." 47 U.S.C. 531(e). One of the provisions added in 1992 and challenged in this case, however, permits operators to exercise limited editorial control. Section 10(c) of the 1992 Cable Act provides that the FCC "shall promulgate * * * regulations * * * to enable a cable operator of a cable system to prohibit the use * * * of any [PEG channel] for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." Pub. L. No. 102-385, 106 Stat. 1486 (47 U.S.C. 531 note (Supp. V 1993)). See U.S. Br. 5-6 (discussing FCC's interpretation of that language).

Section 506(a) of the 1996 Act amends the earlier provision regarding cable operators' editorial control, 47 U.S.C. 531(e), to add the following language: "except a cable operator may refuse to transmit any public access program or portion of a public access program which contains obscenity, indecency, or nudity." App., *infra*, 3a. Section 506(a) does not amend Section 10(c), and no provision that petitioners attack is altered by the new statute.

b. Section 506(b) makes virtually identical changes to the leased access provisions of the Communications Act. Since 1984, the statute has provided that "[a] cable operator shall not exercise any editorial control over any video programming [on a leased access channel], or in any other way consider the content of such programming," with a single exception not relevant here. 47 U.S.C. 532(c)(2). One of the provisions challenged in this case, however, permits operators to exercise limited editorial control. Section 10(a) of the 1992 Cable Act, codified at 47 U.S.C. 532(h) (Supp. V 1993), provides that "[t]his subsection shall permit a cable operator to enforce prospectively a written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards."

Section 506(b) of the 1996 Act amends the earlier provision regarding cable operators' editorial control, 47 U.S.C. 532(c)(2), to provide that "a cable operator may refuse to transmit any leased access program or portion of a leased access program which contains obscenity, indecency, or nudity." App., *infra*, 3a. Section 506(b) does not amend Section 10(a), and no

provision that petitioners attack is altered by the new statute.

c. Insofar as Section 506 merely conforms the previously unqualified language of 47 U.S.C. 531(e) and 532(c)(2) to recognize a cable operator's right to prohibit obscene or indecent access programming that had been the subject of Sections 10(a) and 10(c) of the 1992 Cable Act, Section 506 has no effect on the First Amendment rights of petitioners. If Section 506, however, is believed by petitioners or others to have some additional effect on their claimed First Amendment rights, their appropriate course would be to challenge Section 506 in an action before a three-judge court, pursuant to Section 561 of the 1996 Act.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FEBRUARY 1996

APPENDIX

The Communications Decency Act of 1996, enacted as Title V of the Telecommunications Act of 1996, Pub. L. No. 104-104, provides in pertinent part as follows:

TITLE V—OBSCENITY AND VIOLENCE

* * * * *

SEC. 504. SCRAMBLING OF CABLE CHANNELS FOR NONSUBSCRIBERS.

Part IV of title VI (47 U.S.C. 531 et seq.) is amended by adding at the end the following:

"SEC. 640. SCRAMBLING OF CABLE CHANNELS FOR NONSUBSCRIBERS.

"(a) SUBSCRIBER REQUEST.—Upon request by a cable service subscriber, a cable operator shall, without charge, fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it.

"(b) DEFINITION.—As used in this section, the term 'scramble' means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.".

SEC. 505. SCRAMBLING OF SEXUALLY EXPLICIT ADULT VIDEO SERVICE PROGRAMMING.

(a) REQUIREMENT.—Part IV of title VI (47 U.S.C. 551 et seq.), as amended by this Act, is further amended by adding at the end the following:

"SEC. 641. SCRAMBLING OF SEXUALLY EXPLICIT ADULT VIDEO SERVICE PROGRAMMING.

"(a) REQUIREMENT.—In providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it.

"(b) IMPLEMENTATION.—Until a multichannel video programming distributor complies with the requirement set forth in subsection (a), the distributor shall limit the access of children to the programming referred to in that subsection by not providing such programming during the hours of the day (as determined by the Commission) when a significant number of children are likely to view it.

"(c) DEFINITION.—As used in this section, the term 'scramble' means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.".

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect 30 days after the date of enactment of this Act.

SEC. 506. CABLE OPERATOR REFUSAL TO CARRY CERTAIN PROGRAMS.

(a) PUBLIC, EDUCATIONAL, AND GOVERNMENTAL CHANNELS.—Section 611(e) (47 U.S.C. 531(e)) is amended by inserting before the period the following: ", except a cable operator may refuse to transmit any public access program or portion of a public access program which contains obscenity, indecency, or nudity".

(b) CABLE CHANNELS FOR COMMERCIAL USE.—Section 612(c)(2) (47 U.S.C. 532(c)(2)) is amended by striking "an operator" and inserting "a cable operator may refuse to transmit any leased access program or portion of a leased access program which contains obscenity, indecency, or nudity and".

* * * * *